plaintiff must prove beyond any doubt that the privilege has been exceeded. *Hammer v. Forde* (1914) 125 Minn. 146, 145 N. W. 810. The defendant is allowed greater latitude in the pleadings than as a witness. See (1919) 28 YALE LAW JOURNAL, 608; (1920) 29 *ibid.* 579. In England the rule is broadly stated that no action can be sustained for any defamatory statements arising out of pleadings. *Munster v. Lamb* (1883) L. R. 11 Q. B. Div. 588; *Bottomly v. Brougham* [1908] 1 K. B. 584. The American courts, if not consciously adopting the English view, are nevertheless arriving at the same practical result, since cases are few where the defamatory matter has not been held to be within the privilege. The matter to which the privilege does not extend must be apparently so palpably wanting in relation to the subject matter that no reasonable man could doubt its irrelevancy. As expressed by the courts, it must clearly appear that the defamatory matter was wholly uncalled for, irrelevant, and immaterial, that it was known by the defendant to be false and untrue, and that it was published without cause or justification and with express malice. *Kemper v. Fort* (1907) 219 Pa. 85, 67 Atl. 991; *Sherwood v. Powell* (1895) 61 Minn. 479, 63 N. W. 1103; *Hammer v. Forde, supra.* Though unavailable in the ordinary case, it is well that this qualification exists, since the result is to prevent wanton attacks on another's reputation in pleadings. See Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (1909) 9 COL. L. REV. 579.

MASTER AND SERVANT—COURSE OF EMPLOYMENT—USE OF INCIDENTAL INSTRUMENTALITY.—A servant of the defendant was employed to collect packages in a building in which the plaintiff was the regular operator of the freight elevator. Before the latter went on duty, the defendant's servant asked her to take him up in the elevator. While the plaintiff was obtaining permission from the superintendent, the defendant's servant entered the elevator and proceeded to the tenth floor. Upon returning, the plaintiff stepped into the vacant shaft, receiving the injury for which suit was brought. There was no contention of contributory negligence. A verdict for the plaintiff was set aside on the ground that it was contrary to law. *Held,* that the plaintiff could not recover. Guy, J., *dissenting. Besnar v. American Express Co.* (1921, Sup. Ct.) 115 Misc. 515, 188 N. Y. Supp. 786.

A master is ordinarily liable to third persons for injuries caused by the negligence of a servant acting in the course of his employment. This sometimes occurs in the performance of the act authorized. *Houston v. Keats* (1917) 85 Or. 125, 166 Pac. 531. Liability may result from the choice of the means of doing an authorized act. *Phelon v. Stiles* (1876) 43 Conn. 426; *Poucher v. Blanchard* (1881) 86 N. Y. 256; Mechem, *Agency* (2d ed. 1914) sec. 1878. Or, as in the principal case, from the servant's negligent use of an ordinary means of performance. *Evans v. Davidson* (1880) 53 Md. 245; *Seymour v. Greenwood* (1861, Exch.) 6 Hurl. & Norm. 359. Liability is imposed even if the method of performance is contrary to the explicit instructions of the master. *Klitch v. Betts* (1916) 89 N. J. L. 348, 98 Atl. 427; *Defoe v. Stratton* (1921, N. H.) 114 Atl. 29; Labatt, *Master and Servant* (1913) sec. 2285. That the instrumentality which occasioned the injury did not belong to the master will not in itself preclude recovery, if the tort was within the scope of the servant's employment. *Goldsmith v. Cheesebrough* (1921, Md.) 113 Atl. 285; Labatt, *op. cit.* sec. 2282. Even if the use of the elevator could be called a deviation from the master's service, a slight deviation does not relieve the master of liability. *Thomas v. Lockwood Oil Co.* (1921, Wis.) 182 N. W. 841. A servant is acting in the course of his employment when he is doing something incidental or natural to the promotion of his master's business. *Flores v. Garcia* (1920, Tex. Civ. App.) 226 S. W. 743; Mechem, *op. cit.* sec. 1874; Laski, *Vicarious Liability* (1916) 26 YALE LAW JOURNAL, 105. Whether or not a servant is acting in the course of his employment is a mixed

question of law and fact. *Richard v. Amoskeag Mfg. Co.* (1920) 79 N. H. 380, 109 Atl. 88. The question might well have been left to the jury in the instant case, as the dogmatic view of the court rather clearly overlooks the general trend of recent decisions in point.

PLEADING—BURDEN OF PROOF—WHERE WARRANTY IS DENIED BY VENDOR.—The vendor brought an action for breach of a contract for the sale of seed, alleging that the vendee agreed to buy the seed, and refused to accept it. The vendee pleaded a general denial; that the contract into which he entered with the vendor contained a warranty of quality, and that the seed was not of the quality warranted. The vendor denied the existence of the warranty. The trial court held that the burden of proof was on the defendant. *Held,* (four Judges *dissenting*) that the ruling of the trial court was correct. *Wilson v. Moran* (1921, Okla.) 197 Pac. 1051.

A warranty of quality in a contract of sale has a legal effect dependant upon the stage of performance. Anson, *Contract* (Corbin's ed. 1919) sec. 399. A breach of warranty in an executory contract goes to the essence; the existence of the fact warranted is a condition precedent to the vendee's duty to accept the goods and the vendor's right to payment. Williston, *Sales* (1909) sec. 184. If the vendee accepts the goods the warranty is considered collateral to the main purpose of the contract, a breach of it giving the vendee only a right of action for damages, or a recoupment in a suit by the vendor. *Pound v. Williams* (1904) 119 Ga. 904, 47 S. E. 218. A vendee bringing an action for breach of warranty must prove its existence and breach. When, however, the existence of a warranty is not denied in an *executed* contract, and the vendee alleges its breach as a defence to the vendor's suit, there is an apparent conflict as to which of the parties must prove the *fulfillment* or *breach* of the warranty. *Roper v. Wells* (1917) 182 Iowa, 237, 165 N. W. 385; *Terry v. Adams-Hicks Zinc & Lead Corp.* (1920, Mo. App.) 222 S. W. 488. But in similar circumstances where the vendor denies the very *existence* of the warranty, the burden is upon the vendee to prove its existence. *Rosenberg-Nougass Co. v. Bischoff* (1918, Sup. Ct.) 170 N. Y. Supp. 359. The instant case manifestly confuses proof of breach of a warranty with proof of its existence, and also the effect of a warranty when the contract is executed and when it is not. The contract was *executory,* the vendee having refused the shipment. The existence of the facts as warranted was then a condition precedent. Williston, *loc. cit.* The vendor alleged an unconditional contract containing no warranty, and the vendee's defence was the existence and breach of a warranty. There is no apparent reason for relieving the plaintiff from the burden of establishing the unconditional contract upon which he is suing. The ruling of the trial court placed upon the defendant the burden of disproving the contract pleaded by the plaintiff, that is, the risk of non-persuasion of the jury was placed upon the defendant, and if the evidence had been in equilibrium he would have lost. The defendant seems to have been done a rather gross injustice.

PROPERTY—MORTGAGE OF GOOD WILL AND TRADE-MARKS IN GROSS.—The petitioner held a mortgage on the property of a publishing corporation. The mortgage turned out to be invalid as to the chattels and other property therein described, whereupon the plaintiff sought to have it construed as a valid transfer of the good will and the trade-marks of the company. *Held,* that the good will and trade-marks could not be mortgaged apart from the business to which they were attached. *In re Leslie-Judge Co.* (1921, C. C. A. 2d) 272 Fed. 886.

There is nothing in the nature of good will and trade-marks that makes their mortgage in gross inherently impossible. Good will is either (1) non-transferable, (2) transferable in gross, or (3) transferable only when "appurtenant" to other property. The first group of cases is confined to good will derived solely from the personal qualities of individuals in certain professions, e. g. musicians;